SHIFTING THE BURDEN—COMPENSATION FOR INJURIES.

BY A. MAURICE LOW.

In his latest speech at Jamestown, President Roosevelt advocated legislation by which a working-man injured in the course of his employment shall be compensated by his employer. This, in a few words, is the substance of the President's deliverance. Like all of Mr. Roosevelt's utterances, it has been severely condemned and with equal vigor commended. He has been accused of having enunciated "an entirely new and radical doctrine," of having advocated "a new kind of paternalism calculated to have a deadening effect upon the sense of individuality," of having advanced an argument "that smacks of socialism," of having given expression to views that are "demoralizing and degenerating to the very theory of our Constitution." Censure and praise are equally extreme. Mr. Roosevelt has made no discovery, he has not even elaborated an old theory; whether his doctrine is radical will depend upon the point of view. *En passant,* it is interesting to note that in political terminology the word "radical" means one thing in England and quite another thing in the United States; and what is "radical" in America is simply "progressive conservatism" in England. Every foreigner who has studied the United States sociologically is always amazed at the paradox of its conservatism. He is led to expect that this country will be the world's laboratory for experimenting in social legislation, that every theory will be tested to demonstrate its truth, and that the United States will lead in social legislation. On the contrary, he finds that Americans are much more cautious in undertaking social experiments than Europeans. A law placed on the statute-books by the Conservative party in England, as a logical development in the progress of society, is considered by many Americans

intensely radical, dangerously socialistic, in that it strikes at the very foundation of society and threatens not only the social order, but the destruction of national independence. It is presumed that Mr. Roosevelt is at least reasonably familiar with the official publications of his own Government, and Bulletins No. 32 and 70 of the Department of Labor will show that the scheme he advanced at Jamestown has been in operation in England for the past ten years. Whether it is advisable to borrow legislation of this character from England I shall not now discuss; but, in view of the attention given to the subject by serious-minded men, I propose briefly to explain the reasons which led to the adoption of the Act, the objects sought to be accomplished and its results.

To meet the issue frankly, let it be said at the outset that this is "class legislation" in its most extreme form, but in that it differs not in the least from the whole mass of "Protective Legislation" that for the last half-century has constituted the chief work of lawmakers the world over. By protective legislation the sociologist means those laws designed to protect the laborer, the wage-earning class, the men and women engaged in gainful operations, from the consequences of their own folly or ignorance and the cupidity or indifference of their employers. Laws restricting hours of labor or output, requiring proper sanitation in factories, providing for safety appliances in mines and railways, fencing machinery to safeguard employees, prohibiting the employment of children of tender age—these and all similar laws which we now regard as a matter of course first found their expression in England with the beginning of the factory system, and were acknowledged to be in the interest of a class—a class which the State was morally bound to protect because it was incapable of protecting itself. Space will not permit me to go into this branch of the subject at any length, and a recent bulletin of the Bureau of Labor (No. 70: "A Short History of Labor Legislation in England") traces in concise form the genesis and growth of this legislation; but two things must be emphasized. One is that, having had their inception purely in humanitarianism, it was not until long afterwards that the economic value of these laws was understood, and it took men many years to grasp what is now a truism, that there is a certain limit of physical endurance, and that, when that limit is reached, labor ceases to be profitable. In other words, it is cheaper to work a man

eight hours a day than it is to work him ten or twelve, because after he has worked eight hours he is mentally and physically fagged out and his work falls below the profitable standard. The other fact, of equal interest, is that at the beginning both employers and employees opposed the laws, the one believing that it would ruin them, and the other, that it was an interference with freedom of contract, and hampered them in the sale of their only commodity, their labor. Both theories have been proved to be fallacious.

The British Workmen's Compensation Act, which came into operation on July 1st, 1898, both destroyed and created—it struck down, in effect, although not in expressed terms—the pernicious common-law doctrine of "common employment," and it laid an obligation upon the employer to succor his employees when in distress. The doctrine of "common employment," which the courts of this country recognize, relieves an employer of liability for an injury caused to a person in his employment if the injury was the result of the negligence of another person also in his employment. Thus, if a man employed by a railway company in New York to couple cars does his work so negligently that, when those cars are uncoupled in Chicago, the employee there must inevitably have his hand crushed, under the common-law doctrine of "common employment" he has no remedy against the railway company, as the man in New York and the man in Chicago are "fellow servants," and each assumes the risk of negligence on the part of the other—a doctrine manifestly unjust. The common law has further protected the employer by the application of the principle of "*volenti non fit injuria.*" If the employer can prove that the employee was injured in the course of his occupation by a risk which it is inferred the workman must have known, the employer is relieved of liability. To succeed in an action at common law for an injury caused by defective plant, it would be necessary to prove that the employer knew, but the workman was ignorant of the defect which caused the injury. A further obstacle to the recovery of damages by a workman in an action at common law is the defense of "contributory negligence"; the law holding that, if the injury was caused through the combined negligence of both parties, the injured person cannot recover. Thus, it might be the duty of a workman to clean a machine in motion, and the owner of the

machine might not have equipped it with a safety device to prevent accident; yet, although the workman might be maimed for life because of the parsimony or indifference of the employer, it might be easy for him to show negligence on the part of the workman, and under the common law doctrine of contributory negligence the workman could obtain no redress.

It will be seen, therefore, that while, theoretically, the law of England gave a workman protection and compensation when he met with an accident in the course of his occupation, in point of fact he seldom if ever was able to obtain redress. The doctrines of common employment, *volenti non fit injuria* and contributory negligence were ramparts about the employer that the working-man was unable to overthrow. The injustice of this was so apparent that an agitation began for an amendment to the law that would place employer and employee more nearly on an equality. It was not until 1880 that this agitation bore fruit in the passage of the Employer's Liability Act, which makes an employer liable for injury to a person in his employ when the injury is caused by defective plant or machinery or the negligence of persons entrusted with superintendence. But that law really did little to correct the evils it was designed to meet. It was, in the first place, difficult to prove negligence; many accidents are not due to negligence, but are an unavoidable incident arising out of the occupation; and as most employers refused voluntarily to make compensation, the result was costly and uncertain litigation. Speaking generally, it may be said that the working-man was little better off after the passage of the Employer's Liability Act than he was before.

When the Act was found to be unsatisfactory, numerous attempts were made to secure its amendment, which principally took the form of the abolition of the principle of "common employment." In 1893, Mr. Asquith, the Home Secretary, representing the Government of the day, brought in a bill for that purpose, which after passage by the Commons was rejected by the Lords. That bill finally grew into the Workmen's Compensation Act in the form of an amendment moved by Mr. Chamberlain, in 1897, "that no amendment of the law relating to employer's liability will be final or satisfactory which does not provide compensation to workmen for all injuries sustained in the ordinary course of their employment, not caused by their own

act or default." This is the principle of the law as it now stands. "It is difficult to overrate the boldness or importance of the step then taken by the legislature," is the statement made by a departmental committee appointed by the Secretary of State for Home Affairs in 1903 to inquire into the workings of the law.

It has already been observed that, in the long struggle between humanitarianism and cupidity and criminal indifference, when a finer ethical conception and a wider knowledge of the duties of society induced a small number of men to bring about the passage of protective legislation, that legislation was always opposed both by masters and workmen, because both believed the burden would fall on them. It was so in this case. Prior to the passage of the law, Mr. John Wilson, a member of Parliament and secretary of the Durham Coal Miners' Association, in a circular issued to his Association said, supposing a scheme of compensation adopted, the money will no more come from the employer than "the water we drink comes from the tap or the pipe it flows out of. It may run out of the tap, but it must come from the spring or other source. So the money paid will come from the spring of the employer's wealth—the labor of the workman."

Manufacturers and the employers of labor generally saw in this law, if not their ruin, at least a very heavy reduction of their profits. They did not agree with Mr. Wilson that the money paid in compensation would "come from the spring of the employer's wealth—the labor of the workman"; on the contrary, they held it would come out of their own pockets. The colliery proprietors, for example, asserted that the proposed law would impose a charge equivalent to three pence per ton on every ton of coal mined, or an annual charge of £2,375,000. When the bill was pending in the House of Commons, Mr. Asquith agreed with Mr. Wilson, and suggested that, inasmuch as a large share of the burden would fall upon wages, the working-men would gain little benefit. Mr. Chamberlain replying to Mr. Asquith said that, admitting the correctness of the argument, "every addition to the cost of manufacture must come out of wages, which, I think, will reduce the argument to an absurdity." In the course of the same debate he said: "We have provided for those who are injured by no fault of their own, but we have gone beyond that, because we have provided for those who have contributed to the accident from which they suffer."

The law provides that a workman injured in the course of his occupation, when that injury is not due to any violation of the rules and regulations established and approved by the proper authorities for the conduct of the business, whether or not that accident was due to the default or negligence of the employer, shall be compensated by him as follows: In case death results from the injury and the workman leaves dependents wholly dependent upon his earnings, a sum equal to three years' wages, or £150, whichever sum is larger, but in no case to exceed £300; in case of partial dependence, a sum not exceeding the amount payable for total dependency as may be agreed upon or determined; in case of total incapacity, a weekly payment during the entire time of incapacity equivalent to one-half the weekly earnings, but not to exceed one pound. Practically, a working-man totally disabled and unable to earn his living in his regular trade is given a pension for life on half wages, except in those cases where his wages exceeded two pounds a week, as the maximum pension is limited to one pound, but the employer has the option to commute the pension by the payment of a lump sum. In the case of partial incapacity, a sum not exceeding one-half the wages shall be paid during the period of incapacity, but the amount the workman is able to earn may be regarded as a set-off and the employer's contribution reduced accordingly. The law works automatically.

Having thus explained the motives that induced the legislature to enact the law, and the objects sought to be attained, we must now consider three aspects of the subject, namely: Is it the duty of the State to provide for those unable to provide for themselves; and what are the economic and sociologic effects of State interference and assistance?

The first question—the duty of the State to furnish assistance—cannot be answered dogmatically, because the answer to it will be determined by the conception every person has of the proper relation existing between the State, representing society as a whole, and the individual—which is a conception biased by political and other considerations. To those who believe that the State is something more than a "big policeman," and that the State is remiss in its duties when it is content merely to provide prisons and hospitals, the principle exemplified by the Workmen's Compensation Act is logically the proper development of the highest

form of social duty; to those who hold to the contrary and believe that the best-governed state is the least-governed state, the liability thrown on the employer for compensation to his workmen may well be regarded "a pernicious doctrine." As the question, in this connection, is academic no profitable end can be gained by its discussion at this time. But when we approach the other phase of the question—the effect of the law sociologically and economically—we are on surer ground.

The test of every law is time—the experience which proves whether philosophically the law meets a demand or is merely the unconsidered expression of momentary excitement; and the supreme test of all economic laws is the response to the demands made upon it in a time of a falling market. In other words, an economic law is like a ship whose buoyancy and stability and general seaworthiness can only be proved, not when it lies at anchor, but when it has been buffeted by wind and wave. In a rising market, when the times are good and labor is scarce, every pseudo-economic law justifies itself, as the most unseaworthy craft does in fair weather; but it is only in time of stress that we are able really to discover whether a law is economically sound or an assumption predicated on false principles. The Workmen's Compensation Act has not received such a thorough test as would enable us to speak with conviction as to its economic workings, because since its passage the United Kingdom has enjoyed great prosperity, and in England, as in this country, the demand both for products and labor has fully kept pace with the supply.

Two years after the passage of the law, in 1900, the writer made in England and Scotland a study of its operations for the United States Bureau of Labor; and last year, as an incident to another sociological investigation, he paid some attention to its workings, to ascertain to what extent his conclusions of 1900 should be modified. In the report of that year it was stated:

"During the brief period the law has been in force there has been a demand greater than the output for nearly all forms of manufactured articles, and labor has found steady and remunerative employment at constantly increasing wages. In some trades there has been a scarcity of labor, especially since the outbreak of hostilities in South Africa, which seriously affected the labor market by the withdrawal of men from gainful occupations to join the colors. This fact cannot be too strongly emphasized. Both employers and employees agree that the real

merits and defects of the law, its advantages and disadvantages, can only be determined when there is a time of stress, when capital cannot find a productive return, and when labor cannot find employment and the wage scale declines."

With the insufficient data then in possession of the writer, it was only possible to reach one conclusion, that the cost of compensation had not been a tax laid upon the working-men in so far as it imposed a charge upon his wages, as wages instead of having decreased since the law came into effect were higher than before its passage; but it must be repeated that not one but many things affect the level of wages. The natural assumption, then, would be that, as compensation had cost the working-man nothing, the full burden had fallen upon the employer, which is an assumption justified only in part. In estimating the cost of production, a manufacturer calculates the cost of raw material, labor, interest on his capital, expense of distribution and factory and office charges, rent, insurance, advertising, etc. Assuming that compensation to workmen is equivalent to five per cent. (this estimate, of course, is purely arbitrary) of the annual wage roll, here is a fixed sum which must come either out of profits or be added to the selling-price. It may often happen, however, that the consumer will not bear the whole cost, as part of it will be taken up in the slack of the chain of industry. From the producer of the raw material to the consumer every article of commerce passes through many hands, every transaction increasing the cost, but also permitting a specific charge incident to production to be widely distributed. But, even if the whole charge fell upon the consumer, which is only another term for the public at large, it would be merely shifting the burden from the shoulders of the individual to the shoulders of many individuals, and the many are better able to bear the burden than the one. Facing facts frankly as they exist, we are forced to recognize that the working-man as a class is financially unable (whether because of improvidence or misfortune, we need not now consider) to bear without outside assistance the strain of illness long continued. Whether the workman goes to a hospital which is maintained by the general taxes of the community, whether he is supported by the contribution of his fellow workmen, whether he is the recipient of charity, it is immaterial in what form the assistance is rendered, the cost falls not on himself, but is assumed by a

limited number of persons. By the statutory enactment the number of persons is unlimited; their limit is only the number of consumers, and each bears his part in sustaining the burden of his fellow. In the report of the departmental committee to which reference has already been made, the conclusion is reached that, "on the whole, we think, the verdict must be favorable to the Act. In other words, we think that great advantages to the workmen have been obtained without imposing any undue pecuniary burden upon the employers."

We have now to consider the sociological effect of the law, and in that connection an important economic-sociologic phase. Is it for the general advantage of society that a workman shall be pensioned when incapacitated in the line of duty, or is it better for himself individually and for society in the aggregate that, when injured, he shall be cast adrift to shift for himself? Here again the answer will be dictated by the teachings of political philosophy. To the disciples of the Manchester School, who preach the doctrine of *laissez-faire* and whose ideal of the State is a stony-hearted stepmother deaf to the cries and blind to the tears of her unfortunate children, State interference is maudlin sentiment destructive to manhood and independence, but the modern view of the duty of the State is more humane, and is actuated by an intelligent selfishness represented by the formula that what is good for one is best for all. We begin by the recognition of a moral obligation, the acknowledgment that those who, by the accident of nature or even by their own laches, are less fortunate must, in a sense, be taken care of by the more fortunate; but in so doing no prop is withdrawn from them, nothing is done to break down their resistance or initiative. If suffering comes to them, suffering is to be relieved; but no premium is to be placed upon suffering, malingering is not to be rewarded. "It may be that the employer finds some compensation," the report of the departmental committee says, "in the improved relations with his workmen, or in the advantages that result from a clear and definite obligation imposed on all employers engaged in the industry, instead of the more indefinite moral obligations which, previous to the legislation in question, were felt to be binding by good employers, but were neglected by bad."

The working of the law has had one effect which probably

no one was wise enough to foresee at the time of its passage. It has, without question, made it more difficult for the old and infirm to obtain employment, and these difficulties will increase whenever the labor market is redundant—that is, whenever trade is slack and there are more men seeking employment than there is work for them to perform. The reason for this is obvious. A man whose faculties are dimmed and whose muscles are relaxed, a man past the prime of life, is more liable to meet with an accident in a trade requiring great alertness of eye, hand or step than a younger man; and, with the fear of compensation always before him, the employer will naturally select the man with the greatest percentage of chances in his favor. In the old days, it made no difference. If a man fell from a scaffold and broke his back or his leg, the employer was under no legal obligation to compensate his dependents or care for him during sickness, but now he cannot escape from this obligation, so that, when the labor supply is plentiful, the selective process will be employed and only those most fit will industrially survive. In the 1900 Report to which I have previously referred, I said:

"This [the discrimination against men beyond a certain age] has been referred to without bitterness, but as a fact, an unfortunate but perhaps unavoidable corollary to the effort made to improve general conditions, which, as a general thing, bring about 'the greatest good for the greatest number,' but incidentally, in the process of adjustment, before its accomplishment entails some suffering on the minority."

The departmental committee was sensibly impressed by this effect of the law. "The evidence has led us to the conclusion," the committee said, "that the Workmen's Compensation Acts have largely increased the difficulties of old men finding and retaining employment. We fear the tendency is for these difficulties to grow."

Admittedly, the law is still an experiment; but it is an experiment that so far has worked well, and employers as well as employed agree that it has served a useful purpose. Experience may prove that, to prevent oppression and to convey the fullest benefits, the law will need to be amended; but one may assert, with due regard for the danger of vaticination before the event, that the Workmen's Compensation Act has been written into the statute-book of England not to be effaced.

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